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HAROLD B. WILLEY, Clerk

No. 543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

G. E. BROWNING, *Petitioner*,
v.
THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, G. E. Browning, having been convicted in the trial court * of a violation of an act of the Texas legislature regulating the dispensing of certain drugs, a copy of which act is hereto appended as required by the rules of this Court, and his conviction having been affirmed by the Court of Criminal Appeals of Texas, the court of last resort in criminal cases in that state, respectfully applies to your Honors for a writ of certiorari to said Court of Appeals and in support of his application submits this petition:

* County Court at Law No. 2 of Harris County, Texas.

The reports of the opinions delivered in the Court of Criminal Appeals have not yet been published. Reference is made *infra* to the opinions as appended to this petition.

The date of the judgment sought to be reviewed and the time of its entry was May 19, 1954 (R. 64).

The order overruling petitioner's motion for rehearing was made June 23, 1954 (R. 74), and the one overruling his second motion for rehearing was made October 20, 1954 (R. 78).*

November 3, 1954, the presiding judge of the State Court of Appeals, upon the motion of the petitioner, issued an order directing the clerk of his court to stay the issuance of the mandate and all other proceedings upon the judgment here sought to be reviewed for a period of 90 days from the date of the order to permit petitioner to make this application (R. 84).

The statutory provision conferring on the Supreme Court jurisdiction to review the judgment in this case by writ of certiorari is Sec. 1257, Title 28 U.S.C., Paragraph 3.

The question presented for review is whether the information upon which the petitioner was tried afforded him due process of law under the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES. The question does not merely involve the sufficiency of the information, it being petitioner's contention that the information is so vague in its statement of the acts constituting the offense upon which he was tried that in effect he was tried without information or indictment.

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*A second motion for rehearing is permitted in the Court of Criminal Appeals of Texas: 4 Tex. Jur.—Appeal and Error—Criminal Cases, sec. 371 et seq., pp. 525-527.

The statute which this case involves is an act regulating the possession, handling, sale and distribution of barbiturates (Acts 1951, 52nd Leg. (Texas), p. 758, ch. 413, now incorporated in VERNON'S ANNOTATED PENAL CODE OF THE STATE OF TEXAS, pp. 16-20, as Art. 726c thereof).

The provisions of the statute are lengthy, but the pertinent text thereof is set forth in the appendix to this petition.

The information upon which petitioner was tried is in words and figures as follows, to-wit:

"IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

Joseph M. Guarino, Assistant District Attorney of Harris County, Texas, comes in behalf of the State of Texas, and presents in and to the County Court at Law, No. 2, of Harris County, Texas, at the August Term, A. D. 1953, of said Court, that G. E. Browning heretofore on or about the 9th day of June, A. D. 1953, in said County of Harris and State of Texas, did then and there unlawfully deliver barbiturates to M. A. Billnitzer.

And the attorney aforesaid further presents in and to said court at said term that heretofore on or about the 24th day of June, A. D. 1953, in Harris County, Texas, the said G. E. Browning did then and there unlawfully deliver barbiturates to M. S. Billnitzer.

And the attorney aforesaid further presents in and to said court at said term that heretofore on or about the 7th day of August, A. D. 1953, in Harris County, Texas, the said G. E. Browning did then and there unlawfully deliver barbiturates to M. S. Billnitzer.

Against the peace and dignity of the State (R. 4, 5).

/s/ Joseph M. Guarino
Assistant District Attorney
Harris County, Texas"

While the federal question was expressly presented neither in the trial court nor the State Court of Appeals, it was impliedly presented and necessarily decided by both courts within the meaning of the case of WHITNEY v. CALIFORNIA, 274 U.S. 357, 360, 71 L. Ed. 1095, 47 Sup. Ct. 641. The question was presented by motion to quash the information (R. 6-10), and motion for new trial (R. 17, 18).

The petitioner in support of his contentions made in this case relies upon the case of FONTANA v. U. S., C.C.A. N.D., 262 F. 283 and the other cases cited in 16 C.J.S.—CONSTITUTIONAL LAW, Sec. 588, p. 1180.

This petition has been prepared by me, the undersigned attorney for the petitioner, and I hereby certify that on the _____day of January, 1955, I mailed to the Solicitor General, Department of Justice, Washington 25, D.C., to the States Attorney of the State of Texas, Capitol Building, Austin, Texas, and to the District Attorney of Harris County, Texas, Criminal Courts Building, Houston, Texas, copies of this petition by depositing the same in the United States Post Office in Houston, Texas, with first class postage prepaid.

Respectfully submitted,

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APPENDIX

Opinion of the Texas Court of Appeals on Submission

(R. 64, 65)

G. E. Browning, Appellant,
No. 26,969. v. —Appeal from Harris County.
The State of Texas, Appellee.

Opinion

Appellant was convicted for the unlawful delivery of barbiturates upon each of three separate offenses alleged in the complaint and information, and his punishment was assessed on each count at sixty days in jail and a fine of $1,000.

Appellant contends that the court erred in overruling his motion to quash the complaint and information upon the ground that they do not negative any of the exceptions set out in other portions of the statute whereby a legal delivery of barbiturates may be made.

Art. 726c, Vernon's Ann. P. C., upon which this case is based, provides in Sec. 12 thereof as follows:

"Sec. 12. In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provisions of this Act, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this Act, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant."

In view of this provision in said statute, there was no necessity for negativing the exceptions.

The testimony of M. A. Billnitzer, a detective for the City of Houston, shows that he visited appellant in Houston on three different dates and each time told appellant that he needed something to make him sleep; that the appellant delivered to him on the first occasion 24 capsules, on the second occasion 26 capsules, and on the third occasion 24 capsules; that he (Billnitzer) delivered the capsules received on these visits in separate packages to Floyd E. McDonald, chemist for the City of Houston Police Department.

Floyd E. McDonald, chemist, identified the capsules delivered to him by M. A. Billnitzer and testified that they contained a derivative of barbituric acid known as sodium pento-barbiturate.

There is no testimony in the record showing that the appellant is "a person licensed * * * to prescribe and administer barbiturates."

We find the evidence sufficient to sustain the conviction.

The judgment is affirmed.

Belcher, Judge

(Delivered May 19, 1954)
Opinion approved by the Court.

Opinion of the Texas Court of Appeals Overruling Motion for Rehearing

(R. 73)

G. E. Browning, Appellant,
No. 26,969 v. —Appeal from Harris County.
The State of Texas, Appellee.

Opinion
On Motion for Rehearing

Appellant's motion for rehearing herein still complains of the proposition that the information does not negative the fact that appellant was one of the persons who came under the "unless" clause in Section 3, Paragraph (1) of the original statute passed by the 52nd Legislature, Regular Session, as found on page 759 of the Acts thereof. He still contends that the State's pleading should have negatived the fact that the appellant was, among other things, a pharmacist operating upon an original prescription, and the many further exceptions that are found therein.

We think the answer to such contention will be found in Section 12 of the original enactment, which is also found in Article 726c, Vernon's Ann. P. C., said Section 12 being quoted in the original opinion herein. We also think the same is in answer to the appellant's contention in this motion.

Thus believing, the motion for rehearing will be overruled.

Graves, Presiding Judge.

(Delivered June 23, 1954).

Opinion of the Texas Court of Appeals Overruling Second Motion for Rehearing

(R. 78, 79)

G. E. Browning, Appellant, §
No. 26,969. § Appeal from Harris County
The State of Texas, Appellee §

Opinion
On Second Motion For Rehearing

It is again insisted that under the rule stated and applied in Anderson v. State, 105 S.W. 2d 258; Baker v. State, 106 S.W. 2d 308; Rice v. State, 38 S.W. 801; and U. S. v. Cook, 21 L. Ed. 538, the information is fatally defective in failing to negative that the barbiturate was a compound, mixture or preparation such as declared to be without the act in Sec. 4 thereof; and in failing to negative the premise that the barbiturate may have been delivered by a pharmacist or practitioner under the conditions and in the manner permitted by Sec. 3a -1 and 2 of the statute.

If the exceptions and provisions are themselves descriptive of the unlawful act and if, in order to show the unlawful act, the state was under the necessity of proving that the act relied upon did not come within the exceptions or provisions then appellant's contention must be sustained.

The authorities mentioned support the contention that the legislature is without authority to relieve the state from negativing an exception which is a necessary element of the offense, without proof of which the things forbidden by the statute in question could not be proved or the case made out.

In considering the problem before us we note that the legislature has declared not only that it shall be unnecessary to negative the exemptions, exceptions, provisos and excuses contained in the act, but has placed the burden of proof thereof on the defendant charged with delivery of a barbiturate.

This section of the act makes it clear that the delivery of a barbiturate is sufficient to show a prima facie violation of the statute, and that the burden then rests on the defendant to show (1) that the barbiturate is excepted under Sec. 4; or (2) that the defendant was a person authorized by law to deliver barbiturates under Sec. 3a -1 or 2; or (3) that the delivery was to a person to whom a barbiturate might be lawfully delivered under the exceptions found in Sec. 5 of the act.

We hold that Art. 726(c) V.A.P.C. makes the delivery of a barbiturate prima facie an offense; provides a method by which barbiturates may be delivered by those qualified and authorized to do so, and provides a means whereby compounds, mixtures and preparations for external use only may be lawfully delivered, but places upon the defendant the burden of showing facts by reason of which the delivery of the barbiturate is excepted, excused or exempted under the statute.

We cannot agree that the legislature was without authority to so provide, and remain convinced that the state was not required to negative the said exceptions, provisos and exemptions in their pleadings.

Appellant's second motion for rehearing is overruled.

Woodley, Judge.

(Delivered October 20, 1954)

Pertinent Text of the State Statute Involved

Section I. The Legislature of the State of Texas hereby finds that it is essential to the public health and safety to regulate and control the handling, sale, and distribution of barbiturates, as defined in this Act.

It is, therefore, hereby declared to be the policy and intent of the Legislature of the State of Texas and the purpose of this Act to regulate and control such handling, sale, and distribution, and, in particular, but without limitation of such purpose, to insure that the public shall receive the therapeutic benefits of barbiturates under medical supervision to the full extent required to assure safety and efficiency in their use; to complement and supplement the laws and regulations of the Congress of the United States and the appropriate agencies of the Federal Government affecting such handling, sale, and distribution; to prevent such handling, sale, or distribution for harmful or illegitimate purposes; and to place upon manufacturers, wholesalers, licensed compounders of prescriptions, and persons prescribing such drugs, a basic responsibility for preventing the improper distribution of such drugs to the extent that such drugs are produced, handled, sold, or prescribed by them.

Sec. 2. For the purposes of this Act:

(a) The term "barbiturate" means the salts and derivatives of barbituric acid, also known as malonyl urea, having hypnotic or somnifacient action, and compounds, preparations and mixtures thereof.

(b) The term "delivery" means sale, dispensing, giving away, or supplying in any other manner.

(c) The term "patient" means, as the case may be: (1) the individual for whom a barbiturate is prescribed or to whom a barbiturate is administered; or (2) the owner or the agent of the owner of the animal for which a barbiturate is prescribed or to which a barbiturate is administered.

(d) The term "person" includes individual, corporation, partnership, and association.

(e) The term "practitioner" means a person licensed by the State Board of Medical Examiners, State Board of Dental Examiners, State Board of Chiropody Examiners, and State Board of Veterinary Medical Examiners to prescribe and administer barbiturates.

(f) The term "pharmacist' means a person duly registered with the State Board of Pharmacy as a compounder, dispenser, and supplier of drugs upon prescription.

(g) The term "prescription" means a written order, and in cases of emergency, a telephonic order, by a practitioner to a pharmacist for a barbiturate for a particular patient, which specifies the date of its issue, the name and address of such practitioner, the name and address of the patient (and, if such barbiturate is prescribed for an animal, the species of such animal), the name and quantity of the barbiturate prescribed, the directions for use of such drug, and the signature of such practitioner.

* * *

(k) The term "Board" means Texas State Board of Pharmacy.

Sec. 3. The following acts, the failure to act as hereinafter set forth, and the causing of any such act or failure are hereby declared unlawful except as provided in Section 4:—

(a) The delivery of any barbiturate unless:

(1) Such barbiturate is delivered by a pharmacist, upon an original prescription, and there is affixed to the immediate container in which such drug is delivered a label bearing (A) the name and address of the owner of the establishment from which such drug was delivered; (B) the date on which the prescription for such drug was filled; (C) the number of such prescription as filed in the prescription files of the pharmacist who filled such prescription; (D) the name of the practitioner who prescribed such drug; (E) the name and address of the patient, and if such drug was prescribed for an animal, a statement showing the species of the animal; and (F) the directions for use of the drug as contained in the prescription; or

(2) Such barbiturate is delivered by a practitioner in the course of his practice and the immediate container in which such drug is delivered bears a label on which appear the directions for use of such drug, the name and address of such practitioner, the name and address of the patient, and, if such drug is prescribed for an animal, a statement showing the species of the animal.

(b) The refilling of any prescription for a barbiturate unless and as designated on the prescription by the practitioner.

(c) The delivery of a barbiturate upon prescription unless the pharmacist who filled such prescription files and retains it as required in Section 6.

(d) The failure by a practitioner who gives a prescription to a pharmacist by telephone to furnish such prescription to such pharmacist in writing within seventy-two (72) hours thereafter.

* * *

Sec. 4. Nothing in this Act shall apply to a compound, mixture, or preparation containing salts or derivatives of barbituric acid which is sold in good faith for the purpose for which it is intended and not for the purpose of evading the provisions of this Act if:

(a) Such compound, mixture, or preparation contains a sufficient quantity of another drug or drugs, in addition to such salts or derivatives, to cause it to produce an action other than its hypnotic or somnifacient action; or

(b) Such compound, mixture, or preparation is intended for use as a spray or gargle or for external application and contains, in addition to such salts or derivatives, some other drug or drugs rendering it unfit for internal administration.

Sec. 5. The provisions of Paragraphs (a) and (e) of Section 3 shall not be applicable: (a) to the delivery of barbiturates to persons included in any of the classes hereinafter named, or to the agents or employees of such persons, for use in the usual course of their business or practice or in the performance of their official duties, as the case may be; or (b) to the possession of barbiturates by such persons or their agents or employees for such use:

(1) Pharmacists;

(2) Practitioners;

(3) Persons who procure barbiturates (A) for disposition by or under the supervision of pharmacists or practitioners employed by them; or (B) for the purpose of lawful research, teaching, or testing, and not for resale;

(4) Hospitals and other institutions which procure barbiturates for lawful administration by practitioners;

(5) Officers or employees of Federal, State, or local Government;

(6) Manufacturers and Wholesalers;

(7) Carriers and Warehousemen.

* * *

Sec. 8. All provisions of this Act shall also apply to amphetamine and desoxyephedrine, or any compound, manufacture mixture, or preparation thereof, except those preparations intended for nasal or other external use.

* * *

Sec. 10a. Any legal proceedings instituted under the provisions of this Act by the Board shall be by any county attorney, district attorney or the attorney General. The Board is hereby specifically prohibited from employing private counsel in any legal proceedings instituted by or against said Board under the provisions of this Act.

Sec. 11. Upon a trial for a violation of any of the provisions of this Act a conviction may be had upon the uncorroborated testimony of an accomplice.

Sec. 12. In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provisions of this Act, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this Act, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant.

Sec. 13. Any person, firm or corporation violating any of the provisions of this Act, shall be fined not to exceed One Thousand ($1,000.00) Dollars, or confined in jail for a period of not less than thirty (30) days nor more than two (2) years, or both such fine and imprisonment. For

any second or succeeding offense of this Act, any person so violating the same shall be confined in the penitentiary not less than two (2) years, nor more than five (5) years.

Sec. 14. If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby. Acts 1951, 52nd Leg., p. 758, ch. 413.